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Liziz Plantation Sdn Bhd v Hong Yik Trading

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO D-02(NCVC)(W)-482–03 OF 2014
ABDUL AZIZ ABDUL RAHIM, MOHAMAD ARIF AND MAH WENG KWAI JJCA
26 FEBRUARY 2016

C

Evidence — Judge — Failure to consider all evidence — Whether trial judge did not adequately appreciate all evidence concerning defendant's counterclaim — Whether testimonies of defendant's witnesses who carried out remedial works to remedy plaintiff's defective work not considered at all by trial judge — Whether D *trial court wrong to have dismissed counterclaim based on un-pleaded allegation*

The respondent sued the appellant in the High Court to recover RM397,416 it claimed was the balance due under an agreement it had with the appellant to carry out certain clearing and construction works on the appellant's plantation. E The appellant, on the other hand, contended that the respondent's works — particularly in the way the 'terraces' and roads were constructed — were defective and it had to appoint two other contractors to carry out remedial works. The appellant counterclaimed for RM146,857.95 being the difference between the respondent's claim and the sum the appellant had incurred to carry F out the remedial works. The High Court allowed the respondent's claim and dismissed the counterclaim, holding that the appellant failed to prove that the damage to the land, requiring the remedial works, was caused by the respondent and not by heavy monsoon rains as was submitted by the respondent. In its instant appeal, the appellant's only complaint was with G regard to the dismissal of its counterclaim. The appellant submitted that the trial judge was wrong to have found that the damage to the land was caused by inclement weather when that allegation was not pleaded or proved by the evidence but merely a proposition advanced by the respondent's counsel.

H **Held,** allowing the appeal and granting judgment on the appellant's counterclaim:

(1) There was inadequate appreciation of the evidence by the trial judge with regard to the appellant's counterclaim. This warranted appellate I intervention (see para 26).

(2) There was no discussion in the trial court's judgment of the testimonies of witnesses as to the probable cause of the defective works or any appreciation or evaluation of the testimonies of the appellant's witnesses, particularly SD3 and SD4, as to why they were engaged to carry out the

remedial works. The trial judge had also decided the case on an issue which was not pleaded (see paras 26 & 29).

(3) The evidence was inconclusive to prove that the damage was caused by heavy monsoon rains. But if the terraces and slopes were damaged by bad weather, remedial work should have been undertaken by the respondent after the period of bad weather had passed. This was because the extension of the contract was 'until the completion of the entire area' which would include all necessary remedial work since cl 2 of the contract said that the works must be carried out to the satisfaction of the estate. The court was, therefore, of the view that the appellant's version, that the terraces and slopes were poorly constructed by the respondent to the extent that they required remedial works to be carried out, was more probable (see paras 22–23).

[Bahasa Malaysia summary

Responden menyaman perayu di Mahkamah Tinggi untuk mendapatkan balik wang sejumlah RM397,416 yang mendakwa adalah baki yang kena dibayar di bawah perjanjian yang dibuatnya dengan perayu untuk menjalankan kerja-kerja pembersihan dan pembinaan tertentu di ladang perayu. Perayu, sebaliknya, berhujah bahawa kerja-kerja responden — terutamanya cara 'terraces' dan jalan-jalan dibina — adalah cacat dan ia telah melantik dua kontraktor lain untuk menjalankan kerja-kerja pemulihan. Perayu menuntut balas bagi wang sejumlah RM146,857.95 sebagai perbezaan di antara tuntutan responden dan jumlah yang ditanggung oleh perayu untuk menjalankan kerja-kerja pemulihan tersebut. Mahkamah Tinggi membenarkan tuntutan responden dan menolak tuntutan balas tersebut, memutuskan bahawa perayu gagal untuk membuktikan bahawa kerosakan kepada tanah, memerlukan kerja-kerja pemulihan, yang disebabkan oleh responden and bukan akibat musim hujan lebat seperti yang dihujahkan oleh responden. Dalam rayuan ini, satu-satu aduan perayu adalah berkaitan penolakan tuntutan balasnya. Perayu berhujah bahawa hakim perbicaraan adalah salah kerana mendapati bahawa kerosakan kepada tanah disebabkan oleh cuaca buruk apabila dakwaan tersebut tidak diplidkan atau dibuktikan oleh keterangan tetapi tetapi hanya cadangan yang dikemukakan oleh peguam responden.

Diputuskan, membenarkan rayuan dan memberikan penghakiman ke atas tuntutan balas perayu:

(1) Terdapat penilaian yang tidak mencukupi terhadap keterangan oleh hakim perbicaraan berkaitan tuntutan balas perayu. Ini mewajarkan campur tangan mahkamah rayuan (lihat perenggan 26).

(2) Tidak terdapat apa-apa perbincangan di dalam penghakiman mahakmah perbicaraan terhadap keterangan saksi-saksi terhadap sebab-sebab mungkin kerja-kerja cacat atau apa-apa pertimbangan atau penilaian

terhadap keterangan saksi-saksi perayu, terutamanya SD3 dan SD4, kenapa mereka diambil bekerja untuk menjalankan kerja-kerja pemulihan. Hakim perbicaraan juga memutuskan kes atas isu yang tidak diplidkan (lihat perenggan 26 & 29).

(3) Keterangan tidak membawa kepada apa-apa keputusan untuk membuktikan bahawa kerosakan adalah disebabkan oleh musim hujan lebat. Tetapi jika teres dan cerun rosak oleh cuaca buruk, kerja pemulihan patut dijalankan oleh responden selepas tempoh cuaca buruk beredar. Ini adalah kerana perlanjutan kontrak adalah 'until the completion of the entire area' yang mana akan termasuk kesemua kerja pemulihan yang perlu memandangkan klausa 2 kontrak menyatakan bahawa kerja-kerja mesti dijalankan untuk memuaskan hati estet. Mahkamah oleh itu, berpandangan bahawa versi perayu, yang teres dan cerun dibina secara tidak baik oleh responden sehingga mereka memerlukan kerja-kerja pemulihan dijalankan, adalah lebih berkemungkinan (lihat perenggan 22–23).]

Notes

For a case on failure to consider all evidence, see 7(2) *Mallal's Digest* (5th Ed, 2015) para 2410.

Cases referred to

Anjalai Ammal & Anor v Abdul Kareem [1969] 1 MLJ 22, FC (refd)
Bank Islam Malaysia Bhd v Aquasix Corp Sdn Bhd & Ors [2014] 3 MLJ 812; [2014] 3 MLRA 449, CA (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

Appeal from: Suit No High Court(1)-22-NCVC-154–10 of 2012 (High Court, Kota Baharu)

N Chandran (Tenh Cheng Tiap and Ranjan N Chandran with him) (CK Lim, Tenh & Chong) for the appellant.
Ahmad Nurie bin Ab Rahman (Nurie Khairuddin & Co) for the respondent.

Abdul Aziz Abdul Rahim JCA:

[1] The appellant (defendant in the High Court) appointed the respondent (plaintiff in the High Court) to do constructions works and cleaning of the appellant's plantation ('the works'). The respondent claimed that it had carried out the works but was not paid in full. The respondent claimed that there was an outstanding sum of RM397,416 ('the claimed sum') due and payable to the

respondent by the appellant for the work done.

[2] There were written contracts executed between the appellant and the respondent for the works. A formal contract is evidenced by the letter of appointment dated 13 November 2009 and the acceptance of the same by the respondent – (see pp 158–160 *rekod rayuan Bahagian* B and C). However this document was filed as bundle of non-agreed document. This, we are unable to comprehend because the document was signed by both parties. However the records also show that there are four other written contracts between the parties and this can be seen at pp 146–152 of the appeal record (Vol 2 – Part B and Part C). These contracts were filed as bundle of agreed documents. Three of the four contracts were all dated 1 August 2010 but each of three contracts was for different works description. Other than that all three have identical terms and conditions – one of which is cl 2 of the contract which provides that payment for '… shall be based on chainage measurement …' of the works '… constructed up to the satisfaction of the Estate'.

[3] The fourth contract is a contract to extend the contract period under the three earlier contracts. The extension contract was made on 1 January 2011. Under the extension contract the parties agreed that the contract period under the three earlier contracts is extended from 1 January 2011 'until the completion of the whole entire area'. The relevant clause in the extension contract reads:

> Due to bad weather and machinery breakdown, therefore both parties had agreed to extend this contract period from *01st January 2011 until completion of the whole entire area*.
>
> Others terms and conditions including the contract rate in the said agreement remains unchanged.

[4] The appellant contended that the respondent had failed to carry out the works as covenanted in the contract in particular as required under cl 2 of the same. The appellant claimed that it had to appoint two other contractors to complete the remedial works at the total cost of RM554,274.45 and had filed a counterclaim against the respondent in the High Court to recover the sum of RM146,857.95, the difference between the sum claimed by the respondent for work done and the sum incurred by the appellant to complete the remedial works not completed or done by the respondent.

[5] After full trial the learned judge allowed the respondent's claim and dismissed the appellant's counterclaim. Hence the appeal by the appellant (the defendant) to us, the Court of Appeal.

[6] The learned judge found on the totality of evidence before him and the

submission of the parties the respondent had on balance of probability proved its claim against the appellant, whilst the appellant had failed to prove its counterclaim against the respondent.

THIS APPEAL AND OUR DECISION

[7] Before us learned counsel submitted that there is no issue with the sum claimed by the respondent. The main complaint is the dismissal of the counterclaim by the learned judge. In dismissing the counterclaim the learned judge found that the appellant had proven that there was damage to the land that needed to be repaired and that the repair works had been carried and completed by a new contractor — Saga Timur dan JWY Maju — appointed by the appellant. However the learned judge also found that the appellant had failed to prove that the damage to the land was caused by the respondent, and not by the heavy monsoon rain as suggested and submitted by learned counsel for respondent. At paras 30–32 of his written judgment the learned judge wrote as follows:

> 30. Saya mendapati bahawa defendan berjaya membuktikan bahawa terdapatnya kerosakan pada tanah yang perlu diperbaiki dan pembaikan telah dilakukan oleh kontraktor baru yang mereka lantik (Saga Timur dan JWY Maju). Namun, saya mendapati mereka gagal membuktikan bahawa kerosakan tersebut adalah diakibatkan oleh plaintif dan bukannya akibat hujan lebat pada musim hujan/tengkujuh sepertimana yang dicadang dan dihujahkan oleh peguamcara plaintif yang terpelajar.
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> 31. Berkaitan perkara itu saya mendapati keterangan/dakwaan plaintif bahawa kerosakan kepada teres dan infrastruktur ladang tersebut adalah diakibatkan oleh hujan lebat musim tengkujuh dan bukannya akibat mereka, suatu yang lebih munasabah.
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> 32. Berdasarkan dapatan di atas saya mendapati, atas imbangan kebarangkalian defendan gagal membuktikan tuntutan balas mereka terhadap plaintif dan dengan itu saya mendapati plaintif tidak bertanggungan ke atas kerosakan tanah defendan dan juga kos pembaikan yang dikeluarkan oleh defendan. Atas alasan itu tuntutan balas defendan ditolak dengan kos.

[8] Learned counsel for the appellant submitted that the learned judge had erred in his finding that the damage to the land was caused by inclemental weather when there is no evidence adduce to prove that fact. He submitted that the fact was not even pleaded; it was merely a suggestion and proposition advanced by learned counsel for the respondent. Citing the case of *Bank Islam Malaysia Bhd v Aquasix Corp Sdn Bhd & Ors* [2014] 3 MLJ 812; [2014] 3 MLRA 449 (CA), it was submitted that this court as the appellate court can intervene on the finding of facts by the trial court if the finding is wrong and not supported by evidence. In *Bank Islam*'s case the appellant had granted the first respondent loan facilities. For some reasons the appellant failed to disbursed the loan sum and subsequently the loan facilities were terminated by

the appellant, thereby allegedly causing the first respondent to lose certain business opportunities. The respondents sued the bank for breach of contract. One of the issues in that case was whether the appellant had waived the conditions precedent for the disbursement of the facilities to the first respondent. This issue was never pleaded and raised only at the trial. However the learned judge in that case ruled that there was sufficient evidence to show that the appellant in that case had waived the condition and decided the case in favour of the respondent/plaintiff.

[9] On appeal to this court, the appeal was allowed. On the issue of waiver the court, speaking through the judgment of Ramly Ali JCA (as he then was, and now a Federal Court judge) said as follows:

> [19] In deciding a matter before the court, the court must rely solely on the pleadings prepared by the parties to the proceedings. This has been stressed by the Federal Court in the case of *Menah Sulong v Lim Soo & Anor* [1970] 1 MLRA 1 where it was held:
>
> > I think it is necessary in this case to emphasise once again that the court should give their decision in strict compliance with the pleadings.
>
> [20] The same sentiment was also expressed by the Federal Court in the case of *RHB Bank Bhd (substituting Keong Yik Bank Bhd) v Kwan Chew Holding Sdn Bhd* [2010] 2 MLJ 188; [2009] 3 MLRA 162 as follows:
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> > On this, we would like to add that it is not the duty of the court to invent or to create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to the given set of facts.

[10] Therefore learned counsel for the appellant argued that likewise this instant appeal should be allowed because the learned judge had departed from the strict rules of pleadings and procedure. The learned judge, he said, had decided the case on an issued not raised in the pleadings and which the appellant was not obliged or called to rebut — see *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22 at p 25 (FC).

[11] Learned counsel for the appellant also submitted that on the facts of the matter, it is abundantly clear that the argument that the defective works that required remedial work were caused by heavy monsoon rain during a monsoon season is wholly untenable and indeed preposterous and a clear after thought. He reasoned that this should be obvious to the learned judge because the

contract for the works was executed by the parties only in mid-year – around the months of June and July – which is not normally considered as monsoon season.

[12] Learned counsel submitted that the respondent had called four witnesses including the respondent. Three of the witnesses were former employees of the appellant. They were the general manager ('PW2'), the assistant general manager ('PW3') and the senior general manager ('PW4'). It was submitted that all the four witnesses corroborated each other in saying that the respondent had carried out the work according to specifications and remedied all the defective works.

[13] SP2 was in the employment of the appellant from 2005 until June 2012. He was appointed as assistant manager and was holding that position until 2008 when he was promoted to the position of a manager. At QA7 of his witness statement dated 28 August 2013 he testified that he was the manager of the appellant when the respondent was the contractor engaged to carried out the works. As to payment and remedial work SP2 testified as follows:

Q11. S: Bagaimana prosedur sebelum sesuatu nota bayaran dikeluarkan oleh Liziz?

J: Nota bayaran akan dikeluarkan oleh Liziz setelah berpuas hati dengan kerja-kerja yang telah siap dilakukan oleh mana-mana kontraktor mengikut spesifikasi yang telah dipersetujui dan juga setelah kerja baik pulih dilakukan sekiranya terdapat kerja-kerja yang perlu dibaik pulih.

Q12. S: Bila kerja-kerja siap dilakukan?

J: Selepas kerja-kerja siap dilakukan dan pihak Liziz berpuas hati Estate Management akan mengeluarkan nota bayaran dan akan disahkan oleh saya sendiri 'certified'.

Q18. S: Sebelum sesuatu nota bayaran disahkan, adakah kamu tahu apa yang kamu tandatangan?

J: Ya, saya tahu. Lagipun sebelum saya tandatangan nota bayaran, saya akan pergi ke sesuatu kawasan (estate) untuk memeriksa samada kerja-kerja telah dilakukan mengikut 'satisfaction' Liziz berdasarkan spesifikasi kerja yang ada dalam perjanjian dan juga samada kerja-kerja baik pulih telah dilakukan sekiranya ada. Sekiranya semua mengikut arahan Liziz, saya akan tandatangan sesuatu nota bayaran.

Q35. S: Adakah nota bayaran akan dikeluarkan sekiranya kerja-kerja baik pulih tidak dilakukan?

J: Tidak, nota bayaran hanya akan dikeluarkan setelah kerja-kerja siap dilakukan dan setelah kerja baik pulih telah dilakukan.

Q37. S: Kenapa kamu berkata begitu? **A**

J: Kesemua kerja-kerja yang dilakukan oleh kontraktor akan diperiksa oleh pihak Estate Manager yang dilakukan dengan perjanjian iaitu menepati spesifikasi ataupun kepuasan oleh pihak Liziz.

Q38. S: Berkait dengan baik pulih kerja-kerja di kawasan yang telah siap dilakukan, boleh tolong jelaskan? **B**

J: Kerja-kerja yang dilakukan oleh kontraktor tidak mengikut spesifikasi baru 'baik pulih' dilakukan.

Q39. S: Oleh itu, dalam kesemua kerja-kerja yang telah dilakukan oleh Hong Yik Trading dalam pengetahuan/pengalaman kamu, adakah terdapat kerja-kerja baik pulih telah dilakukan? **C**

J: Ada.

Q40. S: Adakah kerja baik pulih yang telah dilakukan oleh Hong Yik mendapat kepuasan dari pihak Liziz? **D**

J: Ya, ada.

Q41. S: Kenapa kamu katakan begitu?

J: Kerana dia sudah baiki sesuai dengan spesifikasi perjanjian dan saya juga telah turun ke kawasan estate tersebut untuk memeriksa. **E**

[14] The above witness statements by SP2 clearly shows that the respondent had done the works and whenever is required remedial work was undertaken. Payment voucher was prepared only after SP2 has inspected the works. **F**

[15] SP3 was the assistant manager of the appellant at the material times. In his witness statement dated 28 August 2013 his scope of work is to control and monitor all activities of the appellant at Kuala Betis I and II Estate and he to report all the activities and the progress of the works by all the contractors to the manager ie SP2. As to payment and remedial works in relation to the respondent's claim SP3 substantially corroborated SP2 evidence – (see QA4, 5, and 11 of SP3 witness statement). SP4 evidence also corroborated SP2 and SP3 evidence. However a careful scrutiny of the evidence and testimonies of the three witnesses for the respondent show a glaring absence of any evidence showing that the heavy monsoon rain was the cause of the defective works that required remedial action by other contractors engaged by the appellant. **G** **H**

[16] The witness to testify for the appellant was SD1, the Pengarah Urusan for the appellant. In his witness statement (undated) he testified as follows: **I**

S3. Apakah yang terjadi kepada kawasan Block Lombok dan Pos Blau?

J3. Pada tahun 2010 saya telah melantik Plaintif untuk menjalankan kerja pembersihan (clearing) ladang termasuk membina 'terraces'

dan jalan-jalan untuk menanam kelapa sawit. Kontraktor tersebut ialah syarikat Plaintif dan diwakili oleh En. Chia. Kontrak tersebut tidak dapat disempurnakan dalam tempuh masa yang ditetapkan dan dilanjut dari 1.1.2011 hingga Mei 2011.

S4. Apakah yang terjadi dalam bulan Mei 2011?

J4. Pada masa tersebut saya mengupah beberapa orang pengurus termasuklah En Hau (Pengurus Besar) dan juga En Santokh Singh. Mereka telah diberhentikan oleh Defendan pada bulan Jun 2011. Kejadian ini berlaku apabila saya mendapati bahawa mereka telah mengesahkan kerja-kerja yang mengandungi butir-butir palsu dan tidak betul. Apabila saya mendapati ada bukti yang sah saya telah mengarah salah seorang pekerja saya bernama Tamil Selvam untuk membuat laporan polis itu Gua Musang Rpt Paloh 2/00510/11 di mana kedua-dua mereka telah ditohmah membuat kelulusan bayaran terhadap kerja yang tidak disempurnakan.

S5. Apa yang kamu buat terhadap pengurus En Hau, Pengurus Besar?

J5. Kami mengambil tindakan 'domestic inquiry' pada 22 Jun 2011 terhadap perbuatan En Hau dan hasil tindakan ini, En. Hau telah didapati bersalah. Beliau telah diberhenti daripada jawatan Pengurus Besar ladang dan En Santokh Singh telah meletak jawatannya. En Hau yang dilantik semenjak 2003 telah diberhentikan perkhidmatan pada bulan June 2011.

S6. Apa yang terjadi dengan kerja-kerja ladang di Lombok dan Pos Blau?

J6. Setelah saya periksa, saya dapati keadaan di ladang amatlah tidak memuaskan dan kerja-kerja yang dibuat oleh Plaintif kebanyakannya tidak 'puas hati'. Sebelum ini dalam bulan Januari 2011 saya juga upah konsultan bebas untuk membuat laporan pakar mengenai ladang kami ini. Inilah laporan pakar dan laporan pakar juga mengesahkan kerosakan dan keadaan di kawasan di Lombok dan Pos Blau. Pada masa yang sama saya mengarah bahawa semua bayaran daripada Mei 2011 kepada Plaintif diberhentikan kerana Plaintif tidak memenuhi syarat kontrak iaitu 'membuat kerja-kerja kontrak yang tidak puas hati (not satisfactory)'.

S9. Dalam tuntutan kes ini adakah kamu membuat semakan terhadap Nota Bayaran untuk bulan Mei 2011 daripada Plaintif?

J9. Saya ada membuat pemeriksaan di ladang dan dapati kerja-kerja Plaintif tidak puas hati. Saya dapati bahawa terdapat banyak kerosakan terhadap kerja-kerja yang dibuat oleh Plaintif dan ia seperti berikut:

(i) 'Terraces' yang sepatutnya dibina mengikut condong ke dalam supaya air ditakung ke sebelah dalam tetapi 'terraces' dibuat sebaliknya iaitu di condong ke luar. Akibat binaan Plaintif yang tidak betul, 'terraces' tersebut rosak akibat hakisan kerana air

mengalir ke arah luar dan merosakkan 'terraces' di bawah.

(ii) Jalan-jalan yang dibina oleh Plaintif ini merupakan jalan-jalan yang tidak boleh dipakai kerana cerungnya tidak mengikut 'kontour' bukit. Jalan-jalan tersebut dibina mengikut bekas jalan-jalan yang telah digunakan oleh lori balak yang sedia ada.

S12. Adakah kamu pernah berunding dengan Plaintif mengenai kerja-kerja yang dituntutnya?

J12. Plaintif ada meminta bayaran daripada saya dan dengan jelas saya beritahu dia mengenai kerosakan-kerosakan yang berlaku. Plaintif mengakui akan kerosakan tersebut dan pernah menyebut untuk membaik pulih kerosakan. Walaupun demikian Plaintif tidak memulakan kerja baik pulih tersebut tetapi sebaliknya memperkenalkan En Liew dari Syarikat Saga Timur untuk membaiki dan membaik pulih kerosakan.

[17] The next witness to testify for the respondent in the High Court was SD2. In his undated witness statement he testified that he was the estate manager for the respondent's Kuala Betis II Estate since 18 July 2011. He said he reports to the respondent's managing director Mr Simon Liew – SD1. In his QA2 until QA5 of his witness statement, SD2 said:

S2. Siapakah pegawai kanan kamu dan beritahu mengenai jawatan kamu ini?

J2. Sebagai Pengurus Ladang saya melapor kerja-kerja di ladang kepada En Simon Liew, Pengarah Urusan syarikat Defendan dan semenjak bulan Julai 2011 saya telah diarah untuk mengawasi dan menyelenggarakan segala kerja-kerja pemulihan di Ladang Kuala Betis II iaitu kawasan Pos Blau dan Lombok. Tugas saya ialah mengawas kerja-kerja pemulihan akibat kerosakan kepada 'terraces', membina semula jalan-jalan dan lain kerja pembersihan berbangkit daripada kerja-kerja yang dijalankan oleh kontraktor dahulu.

S3. Siapakah kontraktor-kontraktor yang menjalankan kerja-kerja pemulihan ini?

J3. Kontraktor pertama yang menjalankan kerja-kerja pemulihan di Lombok dan Kuala Betis II adalah En. Liew Chee Leong dari Syarikat Saga Timur Sdn Bhd dan kontraktor kedua untuk kerja-kerja Pos Blau adalah JWY Maju Jaya Enterprise iaitu En James Wong. Kerja-kerja baik pulih ini adalah membaiki tebing atau 'terraces' yang rosak. 'Terraces' ini hendak dibaiki kerana ia bercondong ke arah luar dan ini menyebabkan air mengalir ke arah luar dan merosakkan 'terraces' tersebut. Kerja-kerja baik pulih juga melibat kerja membaiki semua jalan-jalan yang rosak. Kebanyakan kerja-kerja ini menggunakan jentera berat.

S4. Bolehkah kamu secara ringkas beritahu keadaan semasa kamu mengambil tugasan semasa memegang jawatan pengurus?

J4. Pada masa tersebut iaitu bulan Julai 2011, keadaan 'terraces' perlu di baik pulih kerana 'potongan' yang betul (no proper cutting of slope) yang tidak dapat memegang air. Akibat 'potongan' yang tidak sesuai kebanyakan 'terraces' tersebut runtuh dan jatuh. Kebanyakan kerja-kerja baik pulih adalah untuk membaiki dan membuat semula (re-construct) 'terraces' tersebut.

S5. Bagaimana dengan jalan-jalan yang dibina di ladang ini?

J5. Keadaan jalan-jalan di ladang ini kebanyakannya rosak dan tidak boleh dipakai. Jalan-jalan ini terpaksa di buat semula kerana ia tidak mengikut 'kontour' dan kebanyakan jalan-jalan yang dibuat oleh kontraktor dahulu mengikut bekas jalan yang diguna oleh lori balak.

[18] In cross-examination of the respondent's witnesses question was put to them whether heavy rain could have caused the damage to the terraces that were constructed.

[19] The response by SD1 was as follows:

C: Terraces akan rosak jika berlaku hujan yang lebat.

A: Tidak setuju.

C: Jalan yang dibuat juga akan rosak jika hujan lebat.

A: Tidak setuju.

C: Nota bayaran siapa yang buat?

A: Manager.

[20] However SD2, under cross-examination, said as follows:

C: Keadaan 'terraces' yang ada kata perlu dibaiki adalah kerana disebabkan hujan yang terlalu lebat sebelum 18.7.2011.

A: Ya setuju, ia salah satu sebab.

C: Keadaan jalan-jalan yang rosak dan tidak boleh dipakai juga adalah kerana hujan yang terlalu lebat sebelum 18/8/2011 iaitu sebelum anda masuk kerja.

A: Ya setuju, ia juga salah satu sebab.

[21] On the same issue, SD3 and SD4 in cross-examination testified as follows:

SD3:

Q: *Berapa tahun pengalaman anda dalam kerja construction?*

A: Sudah 10 tahun.

Q: Berdasarkan pengalaman anda selama 10 tahun, kalau hujan lebat jalan dan terrace akan rosak?

A: Ya, ada kemungkinan.

SD4:

Q: Berdasarkan pengalaman anda selama 5 & 6 tahun kerja ladang/construction, adakah kemungkinan jalan/teres selepas 3 atau 4 bulan siap kerana hujan lebat akan rosak?

A: Kalau hujan berterusan kemungkinan akan rosak.

[22] Based on the answers given by the respondent's witnesses as to the probable cause of the damage to the terraces or slopes in the respondent estate, our view is that the answers are not conclusive to prove that the damage was caused by heavy monsoon rain. We could not find in the appeal records any evidence at all to show that during the period in question there was heavy torrential monsoon rain that could have caused the terraces and the slopes constructed by the appellant to fail. It is noted that the complaint by the respondent is that the terraces and the slopes were defective because they were not properly constructed by the appellant. In fact, one may ask, if the terraces and the slopes could be so easily damaged by heavy monsoon rain if they were properly constructed according to their purpose in the estate? In absent of cogent evidence that they were indeed damaged by heavy monsoon rain, the answers given by the appellant's witnesses in cross-examination as to the suggestion by learned counsel for the respondent remain as conjecture and not as evidence of fact.

[23] There is of course the evidence of the extension of the contracts due to bad weather and machinery breakdown that we have referred to earlier. But the extension is not directly related to the causation of the defectively constructed terraces and slopes that required remedial work. On the contrary one may argued that if the terraces and slopes had been damaged during period of bad weather, remedial work should have been undertaken by the respondent after the period of bad weather had passed. This is because the extension was until the completion of the entire area; which in our view would include all the necessary remedial work since the cl 2 of the contract mentioned above says that the works must be carried out up to the satisfaction of the estate. Therefore we are of the view that the appellant's version that the terraces and slopes were poorly constructed by the respondent to the extent that they required remedial

work is more probable. We are fortified in our view when we scrutinised the evidence by SD3 and SD4 the two new contractors appointed by the appellant to undertake the remedial work

[24] SD3 in his witness statement (undated) testified as follows:

S1. Boleh beritahu jawatan kamu di Syarikat Saga Timur Sdn Bhd dan kaitan dengan Liziz Plantation Sdn Bhd iaitu Defendan dalam kes ini?

J1. Saya adalah pengarah dan mengurus Syarikat Saga Timur Sdn Bhd. Syarikat kami adalah kontraktor yang menjalankan kerja-kerja ladang di Liziz Plantation di Gua Musang. Kerja-kerja yang kami buat adalah kerja-kerja membuat 'terraces' dan membina jalan di ladang Defendan.

S2. Bagaimanakah kamu boleh mendapat kerja kontrak ini daripada Defendan?

J2. Saya mendapat kerja-kerja kontrak ini daripada Defendan melalui kawan saya yang bernama Chia dari Syarikat Hong Yik iaitu Plaintif dalam kes ini. Chia telah mengenalkan saya kepada Simon Liew iaitu Pengarah, Liziz Plantation Defendan. Saya telah diberitahu oleh Chia untuk membaiki terraces dan jalan-jalan yang rosak di kawasan Kuala Betis II, Block Lombok. Selepas ini saya bersetuju dengan Defendan untuk membaik pulih dan membaiki kerja-kerja yang rosak di ladang ini. Tapak ini adalah tempat yang Chia telah buat kerja dan saya terpaksa membuat 're-construction' terraces kerana terdapat kerosakan dan hendaklah dibaik pulih.

S3. Selain dari 'terraces' apakah kerja lain yang kamu buat?

J3. Kerja-kerja lain yang saya baik pulih adalah membaiki jalan-jalan yang rosak dan tidak boleh dipakai. Jalan-jalan hendaklah dibina mengikut 'kontour' bukit dan kerja-kerja baik pulih memakan masa dan banyak kerja.

S4. Siapakah yang menyelenggarakan mengenai kerja-kerja kontrak pemulihan ini?

J4. Seorang pengurus yang bernama En. Rao yang menyelenggarakan dan memberi arahan terhadap kerja-kerja baik pulih ini. Kerja baik pulih ini dimulai pada bulan Julai 2011 hingga bulan Februari/March 2012 dan seperti yang saya katakan kerja baik pulih ini adalah membaiki 'terraces' yang rosak, membaiki dan membuat semua jalan-jalan yang rosak dan juga membina 'terraces' yang baru akibat kerosakan. Kebanyakan kerja-kerja ini menggunakan jentera berat.

[25] SD4 in his witness statement also gave evidence similar to the evidence of SD3 in that his company JWY Maju Jaya Enterprise was engaged by the appellant to repair the terraces and roads in the estate that were damage.

[26] All these evidences were not considered by the learned judge in his judgment. This is notwithstanding that the learned judge had decided the case on an issue which was not pleaded. It appears to us that there is inadequate appreciation of evidence by the trial judge with regard to the appellant's counterclaim. This would warrant appellant intervention.

[27] The Federal Court had in the case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 had endorsed the principle stated in a passage by Gopal Sri Ram JCA (as he then was) in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 to be applied by a trial judge or a trier of fact in appreciating and assessing the quality and the probative of the evidence adduced and relied on to come to a decision. The passage by Gopal Sri Ram JCA in the abovementioned case reads:

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. *Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case.* A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case; the approach to judicial appreciation of evidence is the same. There are a number or important and leading cases in which the point has been considered. (Emphasis added.)

[28] In endorsing the above passage the Federal Court said:

> In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. *In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court.* Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected on the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision in an issue of fact be assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal.

[29] We have carefully read the written judgment of the learned High Court judge in instant appeal. Unfortunately we could not find any discussion on the testimony of the witnesses as the probable cause of the defective works that required to be remedied. We find that there is no appreciation or evaluation of the testimony by the respondent's witnesses particularly that of SD3 and SD4 as to why they were engaged to do the remedial work.

[30] For the above reasons, we allow appeal by the appellant on the counterclaim and allowed it to be set off against the sum claimed by the respondent and ordered that the respondent pay the appellant the balance of RM146,857.95 under the counter claim. We ordered no cost here and below.

Appeal allowed and judgment on the appellant's counterclaim granted.

Reported by Ashok Kumar